*United States Court of Appeals*

*for the Second Circuit*

# APPELLANT'S BRIEF

75-7644

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BUILD OF BUFFALO, INC., HELENE P. SNELL, MARY M. HALL, SHERYL BURCH, ELLA QUINN, DONNEE C. HILL, JEANETTE SHROPSHIRE and ELDA McKINNON, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants

B

P/S

-vs-

Second Circuit Docket No. 75-7644

BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK, et al.,

Defendant-Respondent

UNITED STATES COURT OF APPEALS FILED APR 1 1976 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

BRIEF FOR PLAINTIFFS

BARBARA M. SIMS
Attorney for Plaintiffs-Appellants
Office & Post Office Address
340 Statler Hilton Hotel
Buffalo, New York 14202
(716) 853-1273

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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BUILD OF BUFFALO, INC.,

Plaintiffs-Appellants

-vs-

BOARD OF EDUCATION OF THE CITY OF

BUFFALO, NEW YORK, et al.,

Defendants-Respondents

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BRIEF OF APPELLANTS

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ISSUES

1. Did the District Court err in failing to convene a three judge court pursuant to 28 U.S.C. Section 2281 et seq. where Plaintiffs sought to enjoin enforcement of New York Education Law Section 2573 (10-a) (McKinney's 1970)?

2. Did the District Court err in refusing to certify the class under Civ. Action 74-558, and more particularly after the order of consolidation with Civ. Action 75-437, in which a cause of action under 42 U.S.C. 2000 (e) was alleged?

3. Should the motion for a preliminary injunction have been granted?

## STATEMENT OF CASE

Plaintiffs, individually and on behalf of all persons similarly situated, seek to have this court declare unconstitutional New York State Education Law Section ~~5217~~ 2573 (10-a). (See appendix).

Plaintiffs claim that although N.Y. State Education Law Section 2573-(10-a) is a statute of general application, the law in its practical application affects only those persons desiring to teach in the public schools of Buffalo and therefore is violative of 42 U.S.C. Sections 1981 and 1983.

It is Plaintiff's position as more fully appears from their complaint that the above section is also violative of the United States Constitution, Amendment Fourteen, since those persons who have fulfilled the requirements to teach, as set forth in N.Y. State Education Law, Section 3001 and 3204 (2), and who are qualified to teach in every other school district in New York State, except for New York City, as public school teachers, or who are qualified to teach in any private school in New York State, are discriminated against by having to fulfill an additional requirement in order to be permanently licensed to teach in the Buffalo School

System.

Plaintiffs also urge that the examination requirement pursuant to Education Law Section 2573 (10-a) is also violative of 42 U.S.C. Section 2000-e et seq., because of its disparate impact upon minority teachers, in that:

(a) the percentage of black and/or minority teachers is far less than would normally be expected in comparison with their availability.

(b) the percentage of black and/or minority teachers is far less than the percentage of black and other minority pupils in the public schools, and

(c) also that the examinations by Defendants are violative of 42 U.S.C. 2000(e) et seq. since they have not been validated pursuant to 41 CFR 3.1 - 3.18.

Plaintiffs also allege that New York State Education Law Section 2573 (10-a) is violative of New York Constitution Article I, Sec. 11 and Article V, Sec. 6 and is in conflict with N.Y. State Civil Service Law Section 35 (q).

## PROCEDURAL BACKGROUND

On December 3, 1974 Plaintiffs filed a complaint in the Western District of New York, and on the same date filed a motion for a preliminary injunction (Civil Action No. 74-558). As more fully appears by the Complaint, a motion to convene a three judge court to determine the Constitutionality of New York State Education Law Section 2573 (10-a) was made. (Civil Action No. 74-558)

On October 15, 1975, a complaint was filed in the United States District of New York (Civil Action No.75-437) charging in addition to those actions stated above, a violation based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. Again a motion for a preliminary injunction was made, and in addition a motion was made pursuant to 28 U.S.C. Section 2281 for the empaneling of a three judge court to determine the Constitutionality of New York State Education Law 2573 (10-a).

A decision was rendered and an order entered on November 3, 1975 which:

(1) denied the empaneling of a three-judge court on

the ground that since New York State Education Law Section 2573 (10-a) by its terms applies solely to the city of Buffalo, the statute comes within the "limited application" exception obviating the necessity of a three-judge court, and

(2) denied the certification of a class, and

(3) denied the preliminary injunction.

On November 18, 1975, an order was made and entered in the U.S. District Court for the Western District of New York consolidating Civil Action No. 74-558 with Civil Action No. 75-437. The Court made the same rulings on the aforementioned issues.

A timely notice of appeal was duly perfected in both actions.

On December 3, 1975 a motion to the U.S. Circuit Court of Appeals, Second Circuit was made by the Defendants. An answering affidavit was interposed on behalf of Appellants on December 17, 1975.

By order dated Dec. 23, 1975, the motion to dismiss this appeal was denied.

A motion on behalf of Plaintiffs to extend the time to file the briefs by February 13, 1976 was granted on February 2, 1976, by the U.S. Circuit Court of Appeals, Second Circuit.

## ARGUMENT

### POINT I

A THREE-JUDGE COURT SHOULD BE EMPANELED TO DECIDE THE CONSTITUTIONALITY OF NEW YORK STATE EDUCATION LAW, SECTION 2573(10-a) PURSUANT TO 28 U.S.C. 2281

In their complaint, Plaintiffs allege that N.Y. State Education Law Section 2573 (10-a) is violative of the United States Constitution, Amendment XIV, inasmuch as it imposes upon those persons desirous of teaching in the public schools of the City of Buffalo requirements over and above those required by New York State Education Law to teach in the private schools in the City of Buffalo, and the public and private schools of the entire state of New York (with the exception of the public school system of New York City) and that such additional requirements are in violation of the equal protection clause of the United States Constitution, and the New York State Constitution, Article V, Section 6.

The United States District Court for the Western District of New York by Honorable JOHN T. CURTIN stated that the gist of Plaintiffs' complaint is that the Statute is unlawfully discriminatory because it unfairly discriminates against minority applicants, whereas the major gist of Plaintiffs' complaint is that the statute

unlawfully discriminates against <u>all</u> applicants.

It is this total discrimination which Plaintiffs allege is in violation of the United States Constitution, Amendment XIV, and the New York State Constitution Article I, Section 11.

28 U.S.C. 2281 mandates the convening of a three-judge court when the constitutionality of a state statute is challenged and an injunction is sought.

The Court does not deny that an injunction was sought.

The decision of the Court below states that New York State Education Law Section 2573 (10-a) falls within one of the exceptions to the rules. It cites <u>Moody -vs- Flowers</u> 387 U.S. 97, 101-104 (1967) as authority for the "limited application" exception which obviates the necessity for a three-judge court.

Plaintiffs contend that the statute involved in the <u>Moody</u> case, (supra) is completely distinguishable from the New York State Education Law Section 2573 (10-a).

In the <u>Moody</u> case the statute, by its terms was applicable

solely to a single county.

New York State Education Law Section 2573 (10-a) is, by its terms, a general law, since a law may be general if stated in general terms though it presently affects only a single locality such as a city. Robinson -vs- Broome County 276 A.D. 69, 93 N.Y.S. 2d 662, aff'd 301 N.Y. 524, 93 N.E. 2d 77 (1949), New York Steam Corporation -vs- City of New York, 153 Misc 493, 276 N.Y.S. 99, aff'd. 243 App. Div. 772, 298 N.Y.S. 539, aff'd. 268 N.Y. 137 197 N.E. 172, 99 A.L.R. 1157. (1935)

Appellants contend that a decision as to whether the statute is violative of the equal protection clause of the Constitution might well dispose of this lawsuit.

Plaintiffs urge that the discriminatory aspects of New York State Education Law Section 2573 (10-a) are without rational justification.

Since the statute is a general statute, the Constitutionality of which is challenged, and since a preliminary injunction is sought, the operative provisions of 28 U.S.C. Section 2281 have

been met, and the three-judge court should be empaneled.

POINT II

THIS LAWSUIT, BROUGHT PURSUANT TO 42 U.S.C. 2000(e) ET SEQ., IS BY ITS NATURE A CLASS ACTION, THEREFORE A CLASS SHOULD HAVE BEEN CERTIFIED PURSUANT TO F.R.C.P. 23(b)(2)

In the complaint, Plaintiffs alleged a cause of action charging discrimination in employment by the Defendants on the basis of race, contrary to 42 U.S.C., Sections 1981, 1983 and also contrary to 42 U.S.C. 2000 (e) et seq., commonly referred to as Title VII of the Civil Rights Act of 1964, as amended.

A class action was alleged in the complaint based upon the nature of the cause of action as alleged under 42 U.S.C. 2000 (e) et seq., and specifically, as a consequence of the allegations of race discrimination on the part of the Defendants made by the Plaintiffs.

The Legislative minutes which give perspective to the intention of Congress in enacting the Civil Rights Act of 1964, and several landmark cases establish the general principle that by its very nature a case brought pursuant to U.S.C. 2000(e) et seq. is, in fact, a class action. Legislative History of Title VII

Section by Section Analysis, Congrssional Record (H. 1863) March 8, 1963.

Also See, Bowe -vs- Colgate Polmolive Co. CA-7-(1969), 416 F2d 711, (2 EPD 10, 090), wherein it is stated:

> A suit for violation of title VII is necessarily a class action as the evil sought to be ended is discrimination based upon a class characteristic ie. race, sex, religion........

See also Johnson -vs- Georgia Highway Express, Inc. (CA-5-1969), 417 F2d 1122, 2 EPD 10, 119; Oatis -vs- Crown Zellerbach Corp. (CA-5-1968), 398 F2d 496, 1EPD 9894; Miller -vs- International Paper Co. (CA-5-1969), 408 F2d 283, 1 EPD 9968; Freese-vs- Morrel and Co. (DC Iowa 1966) 2 EPD 9989; Pulp, Sulphite and Paper Mill Workers, Local 186 -vs- Minnesota Mining and Manufacturing Co. (DC Ind. 1969), 304 F. Supp. 1284, 2 EPD 10,017; Quarles -vs- Philip Morris, Inc., 271 F. Supp. 842 (S. Ca. 1967), 55 L.C. 9054.

In the recent California case of Battle -vs- Federal Elecuric Corp. (1975) 10 EPD 10,447, Plaintiff moved for certification of a class where a second amended complaint was served alleging discriminatory treatment to a class. The Defendant then

moved to have the action disallowed as a class action. The Court there held that an immediate motion for class certification by the Plaintiff was premature. See prior decision in the Battle Case in 7 EPD 9243 (1974).

In the later Battle decision, first above cited, the Court stated:

> However, compelling authority seems to have established the concept that Title VII employee discrimination cases are peculiarly appropriate for class action treatment. It has been said authoritatively that these suits, although in the nature of typical self help actions, also have a broad public interest in that they seek to insure fundamental constitutional principles, as well as to advance the rights of the individual plaintiff who brings the action. See Griggs -vs- Duke Power Co., (3EPD 8137) 401 U.S. 424 (1971). Indeed, it seems that with respect to cases of this sort, not every member of the class need be in an identical situation as the named plaintiffs. See Robert -vs- Union Co., (6 EPD 8952) 487 F. 2d 387 (6th Cir. 1973).
>
> Further, it has been deemed that class action certification under Federal Rules of Civil Procedure, Rule 23 (b)(2), where final injunctive, and hence corrective, relief across the board is sought, that certification is proper. Battle -vs- Federal Electric Corp., (supra).

To be permissible under Title VII, class actions must meet prerequisite to class action outlined in Rule 23(a) and (b)(2)

of Federal Rules of Civil Procedure. Under Rule 23(a) and (b)(2), one or more members of a class may sue or be sued as representatives on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of representative parties are typical of claims or defenses of the class;

(4) the representative parties will fairly and adequately protect interests of class.

In addition, the party opposing the class must have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the case as a whole. See Oatis v. Crown Zellerbach Corp. (Supra)

The situation in the case at bar overwhelmingly meets the above set forth standards; therefore, the denial of the certification of the class was erroneous.

## POINT III

### THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED

Under Fed. R. Civil Procedure, 65, an application for a Preliminary Injunction may be requested where Plaintiffs allege and demonstrate a combination of probable success on the merits and the possibility of irreparable injury. An alternative standard that has evolved is that serious questions going to the merits are raised and the balance of hardships tips sharply in the moving party's favor. King -vs- New York City. Civil Service Commission. (DC N.Y. 1973) 382 F. Supp. 1128, citing Clairol, Inc., -vs- Gillette Co. 389 F 2d 264 (2nd Cir. 1968); Checker Motor Corp., -vs- Chrysler Corp. 405 F 2d 319 (2nd Cir. 1969); Pride -vs- Community School Board of Brooklyn, New York, School District #18, Docket No. 72-2371, slip opinion 2nd Cir. June 18, 1973); Stark -vs- New York Stock Exchange 466 F 2d 743, 744 (2nd Cir. 1972).

All Plaintiffs herein and the class they represent have complied with the standards set forth by New York State. Some have been teaching as substitute teachers where their remuneration is less than that of teachers who have passed the teachers examination

since they are not paid for holidays, are allowed no sick time, do not receive hospitalization or other fringe benefits. Other Plaintiffs and the class they represent have been teaching as temporary teachers, where they have been subject to being "bumped" by teachers who have passed the teachers examination irrespective of the later's experience or actual ability to teach.

All Plaintiffs and the class they represent have been prevented from being paid salaries commensurately with those teachers who have passed the teachers examinations given pursuant to New York State Education Law Section No. 2573 (10-a) and would have the same seniority but for the examination requirements.

The teachers examination, prior to September, 1975, was based in part upon the National Teachers' Examination. This examination has been held to be invalid as a predictor of teaching performance. <u>Baker -vs- Columbus Municipal Separate School District</u> 329 F. Supp. 706, aff'd. 462 F2d 1112 (1972).

In September, 1975, the Buffalo Board of Education announced plans to discontinue the National Teachers' examination portion of their examination after some of these Plaintiffs brought a lawsuit challenging it on constitutional and other grounds. See Civil Action No. 74-558 for W.D.N.Y.

Teachers who pass the teachers examination and fulfill the probationary requirements become permanently licensed and tenured. Once tenure is achieved, removal from the position to which the teacher is appointed can only be based upon cause. New York Education Law, Section 2573 (5).

Thus, those teachers, otherwise qualified who are now being prevented from being appointed because of N.Y. State Education Law Section 2573 (10-a), are being irreparably damaged since those persons passing the examinations are being appointed to positions from which they cannot be removed.

In a diminishing school population which results in a shrinking job market, the irreparable injury to the class becomes apparent. See Chance -vs- Board of Examiners (supra) and King -vs- New York City, (supra).

The procedure established by the Buffalo Board of Education pursuant to the authority delegated it by the Legislature, permits untenured teachers to be "bumped" at any time during the school year. Thus, there is a constant shifting, re-assignment or termination of teaching personnel, which results in lower morale

among the affected teachers and pupils and the delivery of an inferior educational product.

The bumping process is dependent upon the rank on eligibility lists promulgated as the result of the teachers' examinations.

Because of Plaintiffs' ranks on the examination, they are in imminent danger of being displaced at all times and in fact have been "bumped" from "temporary" status to "substitute status".

As aforementioned the status is based upon the previous invalid teachers' examinations. These examinations have had an unequivocally discriminatory impact on the hiring and promotion to tenure of black and other minority faculty.

Statistics may be used to show apparent bias since it is only necessary to show that minority examinees as a whole did significantly less well than white examinees. Kirkland -vs- New York State Department of Correctional Services, 374 F. Supp. 1361 D.C. N.Y. 1974; 8 E P D 9 6 7 5 (1974) Walston -vs- Nansemond County School Board, et al. 351 F. Supp. 196, rev'd and remanded 7 E.P.D.

9153 (1974). Griggs -vs- Duke Power Co. 401 U.S. 424. Also see Baker -vs- Columbus Municipal Separate School District (5th Cir. 1972) 329 F. Supp. 706, 462 F 2d 1112, 9EPD 10,165 (1974) Chance -vs- Board of Examiners and Board of Education of New York City (supra). See also Decision No. 72-1885 Equal Employment Opportunity Commission E.E.O.C. Decisions Employment Practices 6385.

Against the irreparable injury that the Plaintiffs will suffer if a preliminary injunction is not granted, the Court must balance the possible injury to the Defendants. In this case, the Defendants, the Buffalo Board of Education and the individual Board members have taken steps to eliminate the discriminatory National Teachers' Examination portion of the teachers' examination. Thus, they concede the objectionable aspects of the test, as previously used by them.

The final and complete remedy of halting appointments as a result of said examination has not been provided to Plaintiffs.

The Defendants will not suffer any significant harm by the grant of the preliminary injunction, since there has already been established a system of appointing substitute and temporary teachers to positions with the same responsibility as that held

by permanent and probationary teachers.

The differentiating factors rest upon salary, fringe benefits, and status, rather than responsibility or performance.

Indeed, the affidavit of the Buffalo Board of Education does not refer to any harm to be suffered by Defendants by the grant of the temporary injunction. The affidavit contains such inaccurate allegations as "Fourth" wherein it is claimed that this lawsuit involved the same issues as a prior lawsuit, whereas this lawsuit alleges a remedy under the Civil Rights Act of 1964, Title VII 42 U.S.C. Section 2000 (e) et seq., not previously alleged.

Additionally, this lawsuit was brought to enjoin the future examinations to be given in November, 1975, as announced by the Buffalo Board of Education as well as to enjoin any further appointments pursuant to past examinations.

In fact, Defendants give no reason why this injunction should not be granted in their answering affidavit. Clearly, the Defendants have not set forth any reason sufficient in law to overcome the obvious imminent danger and irreparable injury which Plaintiffs will suffer unless injunctive relief is granted.

In its answering affidavit in opposition to the order to show cause why a preliminary injunction should not be granted, the Defendant Board of Education does not deny any of the allegations of the complaint.

It does not urge that past examinations have been validated or that future examinations will be validated pursuant to the applicable statutes and cases. See Griggs -vs- Duke Power 401 U.S. 424, 91 S. Ct. 849 (1971).

Thus, the only defense raised by the Defendant Board to the motion for the preliminary injunction that another action was then pending which was brought by different Plaintiffs against a different Teachers' Examination on different grounds. Since no relief had been granted to those Plaintiffs and the class they represent, Defendants urged that no relief should be afforded Plaintiffs in the second action, on the injunction regarding the lists promulgated as the result of past unlawful examinations or to enjoin the administration of future unlaw examinations.

That Plaintiffs are and will be irreparably injured unless the Preliminary Injunction is granted becomes apparent.

The Buffalo Board of Education, however, did not take steps to discontinue making appointments pursuant to the eligible lists promulgated as a result of the admittedly invalid procedure.

Thus, Plaintiffs are in imminent danger of being subject to being terminated from their present insecure teaching positions based upon the past invalid teachers' examination. They also will be subjected to a new teachers' examination which has not been validated, pursuant to ~~41~~ 29 C.F.R. ~~3.1-3.18~~ 1607.

The teachers' examinations were and will be, in part, also based upon an oral examination. The oral portion of examinations has not been objectified in any manner, but instead, has been based upon the subjective predilections of the various examiners.

As far as the facts can presently be ascertained by Plaintiffs, the examiners have not been chosen, nor will they be selected in the future, based upon any specific training in the administration of oral examinations. No objective criteria exist or will be established upon which the answers have been or will be graded, nor is there any mechanism for review, where there is disagreement with respect to the grade relegated to an applicant's oral interview.

The balance of hardship is therefore obviously tipped on the side of Plaintiffs. Thus, this standard as stated in the King case (supra) has been met.

The likelihood that Plaintiffs will prevail on the merits is substantial.

In their complaint, Plaintiffs allege that the examination procedure established under New York State Education Law Section 2673 (10-a) is violative of the United States Constitution, Amendment XIV, in that it subjects teachers in the Buffalo Public School System to unequal protection of the laws, 42 U.S.C. Section 1983 and 1981, in that it deprives them of rights, privileges and immunities secured by the Fourteenth Amendment, under color of State Law and prevents Plaintiffs from having the same right as other teachers in the State to make and enforce contracts.

The complaint also alleges a cause of action under the 42 U.S.C. Section 2000 (e) et seq., in that the testing procedure is discriminatory against blacks and other members of minority groups.

It further alleges that the examinations given by

Defendants are violative of New York State Constitution, Article I, Section 11, Article V, Section 6 and New York State Civil Service Law, Section 35 (g).

The aforementioned allegations have not been denied. The fact that examinations are statutorily mandated is not a defense to this action, but is supportive of Plaintiffs' claim.

The discriminatory impact of the examinations of minority group persons is established prima facie, by the statistics supplied in various reports and exhibits including the Report entitled, "Distribution of Staff by Activity Assignment, Sex and Racial Ethnic Groups, 1974-75, issued by Buffalo Board of Education and tables in exhibits.

The N.Y. State Civil Service Law, Section 35 (g) provides that teachers are members of the unclassified civil service. Much case law supports the position that one of the distinguishing characteristics between the classified and unclassified service is based upon the lack of examination as a prerequisite to placement.

Also by Civil Service Law, Section 35 (g), "the Commissioner is delegated broad powers to prescribe qualifications for appointment for all classes of teaching positions so certified by him, and shall establish specifications setting forth the qualifications for

and the nature and scope of the duties and responsibility of such position."

However, New York State Education Law, Section 2573 (10-a) provides:

> ". . . .The board of education, on the recommendation of the superintendent of schools, shall designate, subject to the other provisions of this chapter, the kind and grade of licenses which shall be required for any position of the teaching staff, together with the academic and professional qualifications required for each kind of grade of license."

The conflict in the provisions is at once apparent. The delegation of authority to promulgate standards to the Commissioner of Education and to the Boards of Education has produced a hodge-podge of standards, almost incapable of ascertainment.

It has produced a situation for teachers, distinct from any other profession. The district by district licensing has denied to teachers a state-wide license, but instead requires a new license and tenure requirement for a teacher who seeks to move from one school district to another.

The licensing provisions create classifications without any rational basis or justification. New York State Education Law, Section 2573 creates a classification of teachers who must perform additional requirements in order to obtain a New York State Teachers' license inasmuch as they must pass an examination and have their names

placed upon a list in order to teach in the Buffalo Public Schools while public school teachers in other areas of New York State need (save New York City) meet only the educational requirements as established by the Board of Regents.

It is not denied that equal protection in its guarantee of like treatment to all permits classification. However, the classification must not be arbitrary or capricious. New York Rapid Transit Corp. v. New York, 303 U.S. 573 2 L ed 1024, 58 S Ct. 939. Class legislation discriminating against some and favoring others has consistently been frowned upon, and is prohibited by the equal guaranty clauses McPherson v. Blacker, 146 U.S. 1, 36 L Ed. 869, 13 S Ct. 3.

Here the classification is based upon the total population of the school district, rather than the school population. Since the number of persons living in the district has only slight relationship to the number of students in the public school, basing licensing procedure on this basis is an arbitrary and capricious classification.

The classification does not take into consideration the fact that regardless of the adult population, the number of children who might attend non-public schools is not considered. Thus conceivably, although Buffalo has a larger overall population than

Rochester, where no teachers examination is required, it is possible that the number as students in the public school system might be larger.

Additionally, controlling the quality of education throughout the State is one of the aims of licensing. The additional requirement of examinations for Buffalo should have some constitutionally justifiable purpose and must rest upon a fair, substantial natural, reasonable and just relation to the object for which it is proposed. New York Rapid Transit Corp. v. New York (supra).

The different licensing provisions for persons teaching in the City of Buffalo, is devoid of any rational justification. Walters v. St. Louis, 347 U.S. 231, 98 L. ed. 660, 74 S. Ct. 505.

In 1973, there were 3,490,000 school children in New York State. Since the examination requirement for Buffalo affects only about 58,000 (in addition to the children who are enrolled in New York City) its scant application in increasing the effectiveness of education in New York State should be carefully weighed.

The licensing power of teachers for the public schools of New York State rests principally with the Board of Regents and the Commissioner of Education. To delegate it to each district superintendent and particularly to provide for examinations without setting standards or guidelines is an arbitrary grant of power which

cannot be upheld. Yick Wo v. Hopkins, 118 U.S. 356, 730 L. Ed. 220,6 S Ct 1064.

The licenses of teachers of the City of Buffalo have no extraterritorial affect, and prohibit the full movement of teachers. See Teachers Compact New York Education Law, Section 107. Teachers who obtain licenses to teach in the City of Buffalo have no superior right to a teaching position in any of the other localities of New York State. After fulfilling the additional requirement to enter into a contract contrary to Title 42 U.S.C. Section 1981, no benefit is conferred if the teacher desires to leave the confines of the City.

Further, the restraint placed upon Boards of Education in hiring experienced and well qualified teachers for schools in large urban areas is obvious. See Education Law Section 107.

Indeed, there is an apparent correlation between the requirement for taking teachers examinations, and the low achievement of urban students.

The requirements imposed by Education Law, Section 2573 (10-a) obviously diminishes the right to contract, which has been enjoined by the provisions of 42 U.S.C., Section 1971.

The aforementioned consideration and others indicate

that substantial questions have been raised with respect to the validity of Education Law, Section 2573(10-a), and that Plaintiffs are more likely than not to prevail in this lawsuit. See also, Unicorn Management Corporation v. Koppers Co. 366 F 2d 199 (2nd Cir. 1966).

## CONCLUSION

WHEREFORE, IT IS THE PLAINTIFFS' CONTENTION
THAT THE AFOREMENTIONED ERRORS IN THE DECISION
OF THE COURT BELOW SHOULD BE REVERSED

Respectfully Submitted,

BARBARA M. SIMS
Attorney for Plaintiffs
Office & P.O. Address
340 Statler Hilton Hotel
Buffalo, New York 14202

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

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BUILD OF BUFFALO, INC., et al

Plaintiffs-Appellants

-vs-

AFFIDAVIT OF SERVICE
Second Circuit Docket
No. 75-7644

BOARD OF EDUCATION OF THE CITY OF BUFFALO,
NEW YORK, et al

Defendant-Respondent

* * * * * * * * * * * * * * * * * * * *

STATE OF NEW YORK )
COUNTY OF ERIE : SS.
CITY OF BUFFALO )

RUBY OLIVE, being duly sworn, deposes and says:

That deponent is not a party to the action and is over the age of 21 years and resides in Buffalo, New York.

That on the 12th day of February, 1976, deponent served three (3) copies of the Brief For Appellants upon the Corporation Counsel, 1100 City Hall, Buffalo, New York, attorneys for the Respondent in this action, be depositing true copies of same enclosed in a post-paid properly addressed wrapper in a post office depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ruby Olive

Sworn to before me this
12th day of February, 1976

John W Turner

JOHN W. TURNER
COMMISSIONER OF DEEDS
In and for the City of Buffalo, N.Y.
My Commission Expires Dec. 31, 1976

State of New York U.S. CIRCUIT Court F APPEALS ~~County of~~ SECOND CIRCUI

BUILD OF BUFFALO, INC., et al

Plaintiffs-Appellants

-vs-

AFFIDAVIT OF SERVICE
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BOARD OF EDUCATION OF THE CITY OF BUFFALO
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Inde

BARBARA M. SIMS
Attorney for Plaintiffs-Appellants
Office & P.O. Address
340 Statler Hilton Hotel
Buffalo, New York 14202

716-853-1273

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Personal Service of the within and of the notice (if any) hereon endorsed, is admitted this day of 19

........................................................................

Attorney(s) for

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Sir:—Please take notice

Notice of Entry

that an of which the within is a copy, was duly granted in the within entitled action on the day of 19 , and duly entered in the office of the Clerk of the County of on the day of 19

To

Attorney(s) for